



King's Research Portal

Document Version
Peer reviewed version

[Link to publication record in King's Research Portal](#)

Citation for published version (APA):

Biondi, A., & Mehta, R. S. (2016). EU Procedural Law. In D. Patterson, & A. Sodersten (Eds.), *The Companion to EU and International Law* (pp. 155-166). Wiley.

Citing this paper

Please note that where the full-text provided on King's Research Portal is the Author Accepted Manuscript or Post-Print version this may differ from the final Published version. If citing, it is advised that you check and use the publisher's definitive version for pagination, volume/issue, and date of publication details. And where the final published version is provided on the Research Portal, if citing you are again advised to check the publisher's website for any subsequent corrections.

General rights

Copyright and moral rights for the publications made accessible in the Research Portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognize and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the Research Portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the Research Portal

Take down policy

If you believe that this document breaches copyright please contact librarypure@kcl.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.

EU PROCEDURAL LAW

Prof. Andrea Biondi and Ravi S. Mehta¹

Abstract

This chapter explores the procedural dimension of the process of European integration. This is a potentially vast area, both in terms of scope (given the now extremely extended substantive EU competences) and in terms of sources as it is based on both case law and harmonizing measures. It is also closely intertwined with well-established rules in national legal systems. Despite several reforms of EU competences, the enforcement of EU rights is still largely carried out by national procedures and courts, subject however to the respect of certain general limitations imposed by the Court of Justice of the European Union. In order to provide a systematization of this heterogeneous field, we analyze it through the prism of the EU Treaties and through three key features of EU procedural law: (a) the basic protections which are guaranteed within the context of EU law (b) the flexibility for national legal systems to retain their internal logic and (c) the desire to establish EU standards of procedural protection. The “classification” of the copious *acquis communautaire* this reveals, allows a critical view to be taken of the judicial analysis of the interests at issue to date.

Introduction

EU Procedural law is a potentially vast and heterogeneous area, which has been the subject of considerable academic analysis.² It is particularly difficult to delimit the scope of our inquiry since the concept of a “procedural” rule is in itself difficult to define,³ and a study of the area could potentially encompass many different legal principles and mechanisms. When taking a broad view of the topic, however, there are striking features. The first is that it is torn between contrasting dynamics: its genesis is driven by very different processes (sometimes legislative or proactive, sometimes judicial or responsive), and its underlying philosophy is often inspired by heterogeneous national legal systems. For instance, the approach to the rights of defence in competition procedures elicits various responses from common law and civil law countries. The second is that – in the fiftieth year after *Van Gend en Loos*⁴ – there is a high level of integration at the procedural level between EU and national law which, at times, has wrought significant changes on national procedures.⁵

Like Magritte’s famous surrealist depiction of a pipe, we will begin by identifying what this chapter is *not* about. We will not consider (i) the procedural

rules in the area of EU criminal law (ii) harmonization initiatives adopted in the last decade, (iii) so-called “substantive” procedural rules (such as the quantification of damages⁶) or (iv) rules applicable to the EU institutions, e.g., interim relief against an EU institution. Whilst undoubtedly important, these initiatives are often sectorally specific and remain the exception to the rule that national systems are the implementers of EU law.

Instead, in this entry, we would like to re-examine the case law of the Court of Justice of the European Union (CJEU) through the prism of the modern structure of the foundational Treaties of the EU: the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

Traditionally branded as “national procedural autonomy,”⁷ EU remedies law has engendered significant scholarship and case law for many decades⁸ and is often explored through a “core narrative” (as Michael Dougan calls it⁹). Professor Dougan’s chapter provides an elegant and compelling account of that history and the determining features of this area.

We believe, however, that the Treaty structure recasts this debate. In our view, such a structure provides three “focal points” through which to view the core principles, on a spectrum of analysis of the interrelationship between national procedures and EU law. Whilst we accept that this is not a “bulletproof” model explaining every case or context-specific result, we believe it to be the most coherent way in which to approach the underlying principles which have emerged over time. Moreover, it accurately expresses three key new features of this area: (1) the calibration of the general framework to different substantive fields; (2) its reconceptualization as a facet of EU fundamental rights protection, and; (3) the potential for substantive regulation of national procedures at the EU level. Ultimately, this variability reflects the inherent nature of procedural law in national legal systems – sensitive to the context and interests at play. However, it is important to identify the different and often opposing interests involved rather than conflating them. We will conduct a concrete study of the interaction between national *res judicata* principles and EU law as an illustration of the challenges and limitations of the current framework.

All Roads Lead to Lisbon: Three Gateways for a Common Framework

The Lisbon Treaty has reshaped the structure of the positive law of the EU, “mark[ing] a new stage in the process of creating an ever closer union” (Article 1, second indent TEU). For EU procedural law, this has led to the formal establishment of three focal points which reflect the issues involved:

At one extreme, are general principles of EU law, which have “constitutional status”¹⁰ including the general principle of “effective judicial protection”. These are often described as “filling the gaps”, amorphous and even hierarchically superior to the provisions of the Treaty.¹¹ Relevant general principles are also expressly

acknowledged in the Treaty, for instance in Article 6(3) TEU. They arguably establish the outer limits within which national procedures must remain.

In the middle of our spectrum are two provisions which recognize the balancing of national and EU interests required at the procedural level:

- Article 4(2) TEU recognizes the respect which the Union must give to the “national identities” of the Member States, including their “constitutional” structures. This would logically include national procedural systems. Article 4(3) TEU then sets out the duty of “sincere cooperation” incumbent on Member States as a corollary to that diversity. This includes a duty to (a) “take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union” (second indent) and (b) to “facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives” (third indent). Article 4 TEU is therefore a schizophrenic provision which requires a balancing of competing interests;
- Article 19(1), second indent TEU is a new provision which specifically states that “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.” Its placement in the general provision which concerns the functions of the CJEU illustrates the vision of Member State remedies as a tool for the implementation of EU law.

Finally, the Treaties recognize the possibility for substantive regulation at the EU level:

- Article 47 of the Charter of Fundamental Rights (incorporated by Article 6(1) TEU), recognizes an individual’s “right to an effective remedy,” wherever Member States are implementing EU law. While this cannot be said to create “new” rights, its influence arguably requires greater intervention by the EU courts in a substantive assessment of national procedures;
- The TFEU goes further, explicitly recognizing competences to harmonize procedural law in the areas of judicial cooperation (Articles 81 and 82 TFEU), the creation of sanctions for so-called “Euro crimes” (Article 83(1) TFEU), police cooperation (Article 87 TFEU), language arrangements and rules governing the creation of European intellectual property rights (Article 118 TFEU), administrative cooperation (Article

197(1)–(2) TFEU) and combating fraud (Article 325(4)). As we will note briefly below, there has been a substantial proliferation of harmonization measures in recent years.

So much for our cardinal “focal points.” We do not suggest that they are unrelated – this will turn on the facts before a court. Indeed, the Explanations to the Charter expressly link Article 47 to the concept of effective judicial protection.¹² However, we suggest that they express the different tensions which this area of law raises: (a) the basic protections guaranteed within the context of EU law (b) the flexibility for national legal systems to retain their internal logic and (c) the desire to establish EU standards of procedural protection.

Interestingly, the CJEU appears to approach this tripartite structure as a distinction without a difference, entering all three gateways to arrive at the same destination. Perhaps the best illustration of this is the most recent authoritative exposition in the Grand Chamber’s judgment in *Unibet*¹³:

38. Under the principle of cooperation laid down in Article 10 EC, it is for the Member States to ensure judicial protection of an individual’s rights under Community law[...].

39. [...] in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law [...].

40. Although the EC Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Community Court, it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law [...].

41. It would be otherwise only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual rights under Community law [...].

42. Thus, while it is, in principle, for national law to determine an individuals [sic] standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection [...].

43. [...] the detailed procedural rules governing actions for safeguarding an individuals rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) [...].

Whilst the CJEU treats our three focal points as facets of a common principle, we explore below how the Treaty structure seems to reflect distinct considerations and tendencies.

Exploring the Gateways

The general principle of “effective judicial protection” was first recognized in the *Johnston*¹⁴ case as a corollary to Articles 6 and 13 ECHR. It reflects “an irreducible core of protection”¹⁵ for a party by means of access to a judicial process, i.e., where an individual has no remedy at all, EU law will step in to provide one. On a number of occasions, the Court has clearly stated that this principle exists independently of considerations of the “effectiveness” of remedies.¹⁶

The principle is best illustrated by *Johnston* and *Unibet*. In *Johnston*, an employee could not bring a claim for sex discrimination in an Industrial Tribunal because a national provision allowed the Secretary of State to certify – conclusively – that her case concerned national security and that derogations from the principle of non-discrimination were therefore justified. In stark terms, the CJEU characterized such a rule as “depriv[ing] an individual of the possibility of asserting by judicial process the rights conferred by the directive” (para 20) and therefore falling afoul of the general principle. In contrast, in *Unibet* it was held that the principle did not require national law to create a free-standing action for the enforcement of EU law, if other effective legal remedies – no less favorable than those governing similar domestic actions – achieved the same result. Similarly, in cases where national law has vested jurisdiction to resolve disputes concerning EU rights in specifically designated tribunals or specific procedures,¹⁷ there is no vacuum which requires the creation of a remedy to ensure the effective protection of EU rights.

Other examples of judicial responses to a vacuum include the creation of new EU remedies, “such as damages liability of the Member States or of a private party.”¹⁸ Thus, the CJEU created the principle of State Liability in the absence of an explicit textual basis in the Treaties.¹⁹ It has required the creation of an interim remedy even where none had previously existed in national law, in order to ensure the effective protection of EU rights.²⁰ It also recognized the possibilities for horizontal actions between private parties on the basis of a breach of competition law.²¹

We see this as distinct from the other “focal points” we have identified. It is clear that the principle does not bite where national law merely imposes preconditions on the access to a court, such as requiring the parties to submit to a prior mandatory settlement procedure.²² Commentators – and, it appears, Advocate Generals – have approached the principle of effectiveness and the principle of effective judicial

protection as expressions of each other.²³ However, this dilutes the strength of the latter principle, and mischaracterizes its object – which is to step in where there is a right without a remedy. Properly construed, many of the cases where the CJEU has referred to that principle have not really engaged it at all since there was no absence of a remedy for it to address. A proper example was *Kadi (no 1)* albeit in the context of *EU procedures*, in which the Court found a breach of the general principle since individuals had no means of making any representations to the body that listed them for the UN’s asset-freezing.²⁴ Whether other aspects of EU procedural law are *also* engaged in a given case may calibrate the standard of review applied and shift the case along the spectrum of analysis, but this should not change the principle’s purity as one of the “focal points.”

A useful way of testing this is to examine the adjacent “focal point” on the spectrum – the most prolific in terms of the case law. The Treaty provisions following the Lisbon Treaty (Articles 4 and 19 TEU) demonstrate the careful balancing act that is needed between expectations of “cooperation” from the Member States and the autonomy which national systems are given *within* EU law.

One of the distinguishing features of the EU system (in contrast, for instance, to federal models) is that national courts are co-opted to be the front line enforcers of EU law. Like every good story, the procedural narrative between EU and national legal systems began with a couple – here the *Rewe*²⁵ and *Comet*²⁶ cases – which established the two requirements now reflected in the Treaties. The decentralized enforcement of Union law requires that (1) rules governing EU-based claims cannot be less favorable than those relating to similar domestic actions (“equivalence”) and (2) they cannot make it impossible in practice or excessively difficult to exercise EU rights (“effectiveness”). Some commentators have emphasized the cooperative nature of this framework, in contrast to – for instance – the “conflict-oriented” model in cases such as *Simmmenthal*.²⁷

The key features of this extensive case law are threefold. First, the minutiae, as well as the control over the basic tenets of the domestic legal system and the role of a given national procedural rule within that system, are left in the hands of national legal orders.²⁸ As such, they are empowered to be the ones to enforce EU law, the latter only creating new remedies where there is a lacuna at the national level (the first “focal point” above).

Second, the assessment of equivalence and effectiveness provides robust latitude for Member States, and EU Courts will often cede the difficult balancing act between competing substantive interests to the national legal order. An illustration of this is the Court’s cautious case law on limitation periods which has for some time allowed significant margins to Member States when identifying what a “reasonable”

period would be.²⁹ The CJEU in many ways keeps an “escape route” for itself to step in where the imbalance is clear, but otherwise remains above the fray.³⁰ This is more likely to be triggered in cases where secondary legislation has already incited national legal systems to provide “penalties [which are] effective, proportionate and dissuasive”.³¹ Given the widespread use of this vague terminology in Directives³² and the absence of guidance as to the meaning of those terms, it would appear that litigation is likely to arise on the question of the necessary remedies at the national level.³³

Third, over time the Court’s approach has matured to allow for corrective mechanisms to address some of the potential inconsistencies of its logic. For instance, it has recognized the ability of national legal systems to enforce principles such as “abuse of rights” to stop parties relying upon EU law in a manner contrary to its underlying objectives.³⁴ Moreover, the Court has insisted that the natural logic of the principle of equivalence is that there should be an internal consistency between remedies for EU rights *inter se*.³⁵

This nuanced framework is a classic creature of EU law, incorporating the tensions at play between legal orders and respecting the autonomy of national systems within the EU. In light of the features above, the intervention of EU law is likely to occur only where there is either a clear difference between national procedures and those for enforcing EU rights, or where there are clear obstacles placed in the path of persons relying on those rights, which have no corollary in the underlying secondary EU legislation which is the origin of the EU rights.

Thus far, the “focal points” we have considered appear limited in nature, either biting only where there is a vacuum to be filled or where there are clear obstacles strewn across the path of those relying on EU rights. However, two developments have heralded a substantive regulation of national procedures: (a) the emphasis on the individual rights of parties to an effective remedy and (b) efforts to harmonize procedural standards at the EU level.

As to the first development, Article 47 of the Charter of Fundamental Rights contains a number of guarantees. However, in general terms, the CJEU’s approach to that provision appears to be quite limited in the context of procedural law. Indeed, the Third Chamber recently stated that “Article 47 of the Charter [...] constitutes a reaffirmation of the principle of effective judicial protection.”³⁶ This would suggest that it does little more than reflect our first “focal point.” However, in our view this statement and the judicial approach which consists of limiting Article 47 to other principles has been adopted in specific circumstances where the particular complaint is analogous to that which is the focus of the general principle of effective judicial protection. The Explanations of Article 47 make clear that it is not *solely* concerned

with that general principle. Instead, Article 47 recognizes the importance of a separate interest – that of individual parties to an “effective remedy” where their rights have been infringed. This is an individual right rather than a systemic principle. It appears that the judiciary takes a similar view, as noted recently by a member of the Court³⁷.

A powerful example of this shift in philosophy is *DEB*.³⁸ *DEB* was a German company which applied for legal aid in support of its claim for state liability against the German State for delay in its transposition of two directives. German law effectively precluded it from bringing this claim, as it (i) required the company to make an advance payment to the court in respect of the costs of the proceedings and be represented by a lawyer (things it could not afford as it was out of funds) and (ii) imposed restrictions on legal persons from applying for legal aid. The CJEU was specifically informed by the referring court that the *Bundesverfassungsgericht* had not taken issue with this restriction under the German Basic Law (paragraph 24). However, the CJEU noted the “right of a legal person to effective access to justice and [...] the general principle of effective judicial protection” (paragraph 29), and “recast the question referred so that it relates to the interpretation of the principle of effective judicial protection *as enshrined in Article 47 of the Charter*” (paragraph 33). It then examined at length the case law of the European Court of Human Rights on legal aid under Article 6(1) ECHR and concluded that “it is not impossible for legal persons to rely upon [Article 47]” (paragraph 59). It went on to set out a framework of analysis for the national court (paragraphs 60–62). While the Court referred to case law under the second “focal point” and the “virtually impossible or excessively difficult” formula, this was arguably a substantial interference with the rules of national law and may herald an increased willingness to enforce substantive guarantees where parties allege that their fundamental right under Article 47 has been infringed.

The second development of note is the proliferation of positive harmonization measures, which have had the direct consequence of calibrating the test applied by the Court when examining national procedural rules. The EU legislator has been busy: as has been noted elsewhere,³⁹ measures have been introduced in areas ranging from public procurement, to sex discrimination, consumer protection, environmental protection, and the enforcement of intellectual property rights. Furthermore, extensive rules concerning civil and criminal justice have been adopted.⁴⁰ This legislative activity, in our view, explains the variations in the case law which are context-specific. For instance, in the field of consumer law the Court has repeatedly insisted, in contrast to its more general case law, that national judges raise *ex officio* questions of EU law which arise in a case.⁴¹ In the area of IP law, the CJEU has lent the weight of its authority to the idea of a pan-European injunction

against infringements of Community trademarks.⁴² Similarly, in the area of environmental protection the Court has intervened to generate new remedies where necessary.⁴³ Finally, its case law in the field of employment has placed particular duties on national courts to ensure the respect of EU law,⁴⁴ as well as to guarantee the existence of effective sanctions.⁴⁵ The Court has also adopted a more interventionist view of limitation periods to that alluded to above.⁴⁶

Somewhere “In-Between”: the Court’s Treatment of *Res Judicata*

As soon as academic hubris tempts one towards systematizing, the question of hard cases which fall “in-between” quickly rears its head. For instance, can the three “focal points” explain the way in which EU law deals with one of the most sacred principles of procedural law: *res judicata*? Delivery of justice within a society requires finality in litigation, despite the possibility that mistakes, new facts and other events might emerge in the future. In recent years, several cases raised the question whether EU law requires national courts to ignore the finality of their previous judgments in order to provide for an effective judicial remedy to breaches of an EU right. The conflict is there to be seen: in one corner, respect for the principle of *res judicata* ensures legal certainty and closure within the national legal order (and engages the flexibility of our second focal point); in the other, the *vulnus* to an EU right would be left unhealed without a remedy (suggesting the need for intervention to protect the core guarantees of our first focal point and to ensure consistent EU-wide standards under our third). The CJEU’s initial reaction fell into our second “focal point”: thus in *Kapferer*, the Court ecumenically recognized the fundamental importance for both the EU⁴⁷ and national legal orders, of the principle of *res judicata*. It concluded that “Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of Community law by the decision at issue.”⁴⁸ A few months later, however, in the *Lucchini* judgment the CJEU found that Italian provisions ensuring the principle of *res judicata* must not be applied in so far as their application prevented the exercise of an EU right – in that case the recovery of state aid granted in breach of EU law.⁴⁹ Finally in *Olimpiclub*, although the Court confined *Lucchini* to the specific area of exclusive EU competences – such as state aid control – it still went on to hold that the Italian Supreme Court’s interpretation of the principle of *res judicata* in tax disputes would lead to results incompatible with EU VAT law and thus it had to be set aside.⁵⁰ In all these cases, the national procedural system in question was supposed to have functioned properly as the appeals process, counter claims, evidence, opportunity to raise new pleas and so on were all in place. There was no vacuum to be filled by looking through our first focal point. Moreover, no legal system provides for an absolute bar to reopening proceedings, thus a mere application of the equivalence test should have sufficed. Instead in *Lucchini* and

Olimpiclub the CJUE substantially intervened to overturn what it perceived to be flawed national adjudications. In the first case the Italian court had disregarded a previous Commission decision, and in the second the Court resisted a certain reading of the *res judicata* principle that would have meant applying an incorrect interpretation of VAT law in all future cases related to the same taxpayer or taxable entity, although for different tax years. These rulings are therefore more related to the preservation of the coherence and exclusive competences of the EU legal system as a whole rather than being concerned with a remedial outcome. When faced with these types of fundamental tensions between legal orders, the Court's results shade between the protection of national autonomy and interventionism. As now candidly admitted by the Court itself, ultimately it all depends on "the particular features of the situations and interests at issue."⁵¹

Conclusion

Where does this leave us? We have tried to recast the extensive developments to date through the use of a conceptual framework which mirrors the foundational Treaties. We consider this reformulation to be an important clarification, given that the case law of the Court so often confuses and combines different concepts in its search for a fair result in a given case. In our view, that methodology fails in two respects. First, it does not clearly identify what the Court is doing when faced with particular facts – a particularly important exercise when it is concerned, as here, with the outsourcing of justice to national legal orders. This makes it difficult to discern clear principles from the case law or to predict which principles the Court will invoke when resolving a dispute. Second, by doing this the Court risks diluting the effect of each notion or giving the impression that a given concept is more limited than it was initially designed to be. For instance, the general principle of effective judicial protection is rarely infringed given that it is invoked in cases where there is no vacuum to fill. When left with an analytical framework such as that in *Unibet*, it is hard to expect more than a form of balancing between national and EU interests. This is only supposed to occur within the context of our second "focal point" on the spectrum, i.e., where there is no underpinning secondary EU legislation in the area, no vacuum without remedies, and the rights of the individual party are not jeopardized so as to require active intervention. The structural guidance in the Treaties may be a more constructive way to measure out the different weights placed on the balance.

Bibliography

Arnall, Anthony. "The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?" *European Law Review* 36 (2011): 51-70.
Biondi, Andrea and Julian Lonbay. *Remedies for Breach of EC Law* London: Wiley, 1997.

Craig, Paul and Gráinne de Búrca. *EU Law: Text, Cases & Materials*. Oxford: Oxford University Press, 2011.

Biondi, Andrea. "The Impact of EU law on National procedural law." In *Civil Procedure Reform in Comparative Perspective*, edited by Niccolò Trocker and Vincenzo Varano, 231–250. Turin Giappichelli: Turin 2005.

Dougan, Michael. *National Remedies before the Court of Justice: Issues of Harmonisation and Differentiation*. Oxford: Hart Publishing, 2004.

Haapaniemi, Pekka. "Procedural Autonomy: A Misnomer?" In *The Europeanization of Procedural Law*, edited by Laura Ervo et al, 87–121. Groningen Europa Law Publishing, 2009.

Kilpatrick, Claire. "The Future of Remedies in Europe." In *The Future of Remedies in Europe*, edited by Claire Kilpatrick, Tonia Novitz, and Paul Skidmore, 1–34. Oxford: Hart Publishing, 2000.

Leczykiewicz, Dorota. "Effective judicial protection of human rights after Lisbon." *European Law Review* 35 (2010): 326–348.

Lenaerts, Koen, Dirk Arts, and Ignace Maselis. *Procedural Law of the European Union*. London: Sweet and Maxwell, 2006.

Reich, Norbert. "Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in case of breaches of EC Rights." *Common Market Law Review* 44 (2007): 705–742.

Rosas, Alan and Lorna Armati. *EU Constitutional Law: An Introduction*. Oxford: Hart Publishing, 2010.

Safjan, Marek. "A Union of Effective Judicial Protection: Addressing a multi-level challenge through the lens of Article 47 CFREU," Keynote lecture at the Annual Conference of the Centre for European Law at King's College, London, February 2014. Available at www.kcl.ac.uk/cel.

Storskrubb, Eva. "Civil Justice – A Newcomer and an Unstoppable Wave?" In *The Evolution of EU Law*, edited by Paul Craig and Gráinne de Búrca, 299–321. Oxford: Oxford University Press, 2011.

Tridimas, Takis. *The General Principles of EU Law*. Oxford: Oxford University Press, 2007.

Van Gerven, Walter. "Of Rights, Remedies and Procedures." *Common Market Law Review* 37 (2000): 501–536.

¹ Professor Biondi is Professor of European Union Law and the Co-Director of the Centre for European Law at the Dickson Poon School of Law, King's College London. Ravi S. Mehta is a practising barrister at Blackstone Chambers, London specializing in EU, competition, public, employment and commercial litigation. All errors or omissions in this piece are their own.

² See, for a general overview, e.g., Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *Procedural Law of the European Union* (London: Sweet and Maxwell, 2014).

³ As to which, see e.g., Pekka Haapaniemi, "Procedural Autonomy: A Misnomer?" in *The Europeanization of Procedural Law*, ed. Laura Ervo et al. (Groningen: Europa Law Publishing, 2009), 87–121; Claire Kilpatrick, "The Future of Remedies in Europe" in *The Future of Remedies in Europe*, ed. Claire Kilpatrick, Tonia Novitz, and Paul Skidmore (Oxford: Hart, 2000) 1, 4 and the "working definition" proposed by Advocate General Van Gerven in "Of Rights, Remedies and Procedures," *Common Market Law Review* 37 (2000): 501.

⁴ Case 26/62 *Van Gend en Loos* (NV Algemene Transporten Expeditie Onderneming) v Nederlandse Administratie der Belastingen [1963] ECR 1.

⁵ A process described as "hybridization" by Norbert Reich in "Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in case of breaches of EC Rights," *Common Market Law Review* 44 (2007): 707.

⁶ Consider most recently the adoption of Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union on 17 April 2014, (available at <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>), following Case C-453/99 *Courage* [2001] ECR I-6297, para 29 and Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619, para 62.

⁷ A term endorsed on occasion by the CJEU, see, e.g., most recently, C-550/07 P *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission* [2010] ECR I-8301, para 114.

⁸ See, for instance, Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases & Materials* (Oxford: Oxford University Press, 2011), Ch. 8; Takis Tridimas, *The General Principles of EU Law* (Oxford: Oxford University Press, 2007), Ch. 8; Michael Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation* (Oxford: Hart, 2004); Andrea Biondi and Julian Lonbay, *Remedies for Breach of EC Law* (Colchester: Wiley, 1997).

⁹ Michael Dougan, "The Vicissitudes of Life at the Coalface: Remedies and Procedures for enforcing Union Law before the National Courts," in *The Evolution of EU Law*, ed. Paul Craig and Gráinne de Búrca (Oxford: Oxford University Press, 2011). See also Anthony Arnall, "The principle of effective Judicial Protection in EU Law: An Unruly Horse?" *European Law Review* 36 (2011): 51–70.

¹⁰ Case C-101/08 *Audiolux SA e.a v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others* [2009] ECR I-9823, para 63.

¹¹ Alan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction*, (Oxford: Hart Publishing, 2010), 47, claim that certain general principles may in fact be "super-primary" law. They point to Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351 as an example of the provisions of the Treaties being subject to general principles (see paras 308 and 326).

¹² *Explanations relating to the Charter of Fundamental Rights*, (2007/C 303/02), OJ C303/17, 14.12.2007, at 29.

¹³ Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* [2007] ECR I-2271.

¹⁴ Case 222/84 *Johnston v Royal Ulster Constabulary* [1986] ECR 1651.

¹⁵ Michael Dougan, "The Vicissitudes of Life at the Coalface," 431.

¹⁶ Most recently, Case C-12/08 *Mono Car Styling SA v Derois Odemis and Others* [2009] ECR I-6653, para 49.

¹⁷ See, e.g., Case C-268/06 *Impact* [2008] ECR I-2483, and *Mono Car*, n 16 above, para 51.

¹⁸ Dorota Leczykiewicz, "Effective judicial protection of human rights after Lisbon," *European Law Review* 35 (2010): 326–348, 333.

¹⁹ Cases C-6 and 9/90 *Francovich* [1991] ECR I-5357 and Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029.

²⁰ Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-2433, para 21.

²¹ See *Courage* and *Manfredi* n 6 above.

²² Joined Cases C-317/08 C-320/08 *Alassini and Ors.* [2010] ECR I-2213.

²³ See Arnall, n 9 above, at 55, referring critically to Advocate General Kokott in Case C-75/08 R. (*on the application of Mellor*) v *Secretary of State for Communities and Local Government* [2009] ECR I-3799.

²⁴ See *Kadi* (no 1), n 11 above, paras 322 to 324.

²⁵ Cases 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para 5.

²⁶ C-45/76 *Comet BV v Produktschap voor Seirgewassen* [1976] ECR 2043, paras 13–16.

²⁷ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629. See Haapaniemi, "Procedural Autonomy," 96.

²⁸ See e.g., Case C-312/93 *Peterbroeck v Belgian State* [1995] ECR I-4599, para. 14; Joined Cases C-430/93 and Case C-431/93 *Van Schijndel and others* [1995] ECR I-4705, para 18 and Case C-261/95 *Rosalba Palmisani v Istituto nazionale della previdenza sociale (INPS)* [1997] ECR I-4025, para 27.

²⁹ See, e.g., Case C-445/06 *Danske Slagterier v Bundesrepublik Deutschland* [2009] ECR I-2119, para 32 and the case law cited there; Case C-542/08 *Friedrich G. Barth v Bundesministerium für Wissenschaft und Forschung* [2010] ECR I-3189, para 28.

³⁰Andrea Biondi, "The Impact of EU law on National procedural law," in *Civil Procedure Reform in Comparative Perspective*, ed. Niccolo Trocker and Vincenzo Varano (Turin Giappichelli: Turin 2005), 231–250.

³¹Case C-271/91 *Marshall v Southampton and South-West Hampshire Area Health Authority* ("Marshall II") [1993] ECR I-4367, para 38; Case C-63/08 *Pontin v T-Comalux SA* [2009] ECR I-10467.

³²For recent examples, see e.g., Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC, [2013] OJ L 178/66, Article 34; Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency [2012] OJ L 315/1, Article 13.

³³Consider a recent example in the reference by the UK Supreme Court to the CJEU in *R (on the application of ClientEarth) v The Secretary of State for the Environment, Food and Rural Affairs* [2013] UKSC 25.

³⁴Case C-206/94 *Paletta II* [1996] ECR I-2382, paras 24–25; Case C-367/96 *Kefalas* [1998] ECR I-2843, para 28; and Case C-110/99 *Emsland Stärke* [2000] ECR I-11569, paras 51–54.

³⁵Case C-460/06 *Paquay* [2007] ECR I-8511, para 52 and the comments related to that case in Michael Dougan, "The Vicissitudes of Life at the Coalface," 423–424.

³⁶Case C-93/12 *ET Agroconsulting-04-Velko Stoyanov v Izpalnitelen direktor na Darzhaven fond "Zemedelie"* – *Razplashtatelna agentsia*, 27 June 2013, nyr, para 59.

³⁷Marek Safjan, "A Union of Effective Judicial Protection: Addressing a multi-level challenge through the lens of Article 47 CFREU," Key-note lecture at the Annual Conference of the Centre for European Law at King's College, London, February 2014, pp. 3, 7, 10–12, available at www.kcl.ac.uk/cel

³⁸*C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] ECR I-13849.

³⁹See Dougan, "The Vicissitudes of Life at the Coalface," 435–437; and Arnall, "The principle of effective Judicial Protection in EU Law," 63–68.

⁴⁰See, e.g., Eva Storskrubb, "Civil Justice – A Newcomer and an Unstoppable Wave?" in *The Evolution of EU Law*, eds. Paul Craig and Gráinne de Búrca (Oxford: Oxford University Press, 2011), 309–321 and Dougan, "The Vicissitudes of Life at the Coalface," 436.

⁴¹Compare, most recently Case C-618/10 *Banco Español de Credito SA v Joaquín Calderón Camino*, 14 June 2012 nyr, to Joined cases C-222/05 to C-225/05 *van der Weerd* [2007] ECR I-4233.

⁴²Case C -235/09 *DHL Express v Chronopost*, [2011] ECR I-2801.

⁴³See, e.g., its creation of an "altruistic group action" for judicial review by an environmental NGO, Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen e. V. v Bezirksregierung Amsberg* [2011] ECR I-3673.

⁴⁴See Case C-144/04 *Mangold* [2005] ECR I-9981 and Case C-555/07 *Küçükdeveci v Swedex GmbH & Co. KG* [2010] ECR I-365.

⁴⁵See, e.g., Case C-63/08 *Pontin v T-Comalux SA* [2009] ECR I-10467, paras 74–75.

⁴⁶*Ibid.* paras 62–63.

⁴⁷See Case C-462/05 *Commission v Portugal* [2008] ECR I-4183, para 23 and more recently C-529/09 *Commission v Spain*, [2013] 0000.

⁴⁸Case C-234/04 *Kapferer v. Schlank & Schick* [2006] ECR I-2585; see also Case C-2/06 *Willy Kempter KG* [2008] ECR I-411.

⁴⁹Case C-119/05 *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA, formerly Lucchini Siderurgica SpA* [ECR] 2007 I-6199.

⁵⁰Case C-2/08 *Fallimento Olimpiclub* [2009] ECR I-7501. It would appear that similar motivations have driven the Court's recent case-law on the scope of EU law – see Case C-617/10 *Åkerberg Fransson* [2013] ECR I-0000, Case C-418/11 – *Texdata Software* [2013] ECR I-000 and C-206/13 – *Siragusa* [2014] ECR I-0000.

⁵¹Case C-249/11 *Hristo Byankov*, [2012] I-608, para 77 and cases cited.